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ALEXANDER L. STEVAS,
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No. 82-347

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

IN THE MATTER OF LEGISLATIVE
DISTRICTING OF THE STATE

C. LAWRENCE WISER,

Appellant

v.

HARRY R. HUGHES,

Appellee

ON APPEAL FROM THE COURT
OF APPEALS OF MARYLAND

APPELLANT'S REPLY MEMORANDUM

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Appellant

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THERE IS JURISDICTION FOR REVIEW BY APPEAL

The State asserts (State's Motion p.2) that this Court does not have jurisdiction under 28 U.S.C. §1257(2), but only under 28

U.S.C. §1257(3). The State is clearly wrong.

Section 1257(2) grants jurisdiction by appeal when the federal constitutional validity of a state statute is challenged and the decision challenged is in favor of its validity. As stated in Stern and Gressman, Supreme Court Practice (5th Ed. 1978) at page 160, "The reference in §1257(2) to a 'statute of any state' has been defined many times to include every legislative action to which a state gives the force of law. See Williams v. Bruffy, 96 U.S. 176, 183. This definition covers more than the laws passed by a state legislature."

Appellant has challenged the federal constitutionality of a part of the legislative apportionment plan of Maryland which is set forth in a joint resolution (House Joint Resolution No. 32, App. 49) passed by both houses of the Maryland

General Assembly and which pursuant to the provisions of Article III Section 5 of the Constitution of Maryland has become law.

Clearly, this joint resolution of the Maryland State Legislature, having the effect of law, is a "state statute" within the meaning of §1257(2).

THE STATE MIS-STATES THE QUESTION

The State of Maryland, in its Motion To Dismiss or Affirm, discussed an entirely different question than the question which Appellant has raised. As a consequence, the State's entire Argument goes off on a tangent and (except for a footnote in State's Motion p. 8) fails to discuss the question appellant has raised before this Court.

Appellant raised the following question in its appeal to this Court.

Whether gerrymandering of

districts drawn for election of members of a state legislative is a denial of equal protection under the Fourteenth Amendment to the United States Constitution to those against whom the gerrymandering is directed.

Instead of responding to that question, the State stated another question which it preferred to discuss, but which is not the issue raised by Appellant, either before this Court or below:

> Is a reapportionment plan which creates legislative districts conceded to be (1) substantially equal in population and (2) in no way racially discriminatory, invidiously discriminatory because it minimizes election contests among incumbents in some legislative districts?

Appellant does not contend, and has not contended below, that minimizing election contests among incumbents by

itself is unconstitutional. But appellant does contend that gerrymandering directed against persons in particular geographical areas is a denial of equal protection to those persons and it may not be done solely for the purpose of minimizing election contests among incumbents.

Because of the weakness of their position, the State and the Special Master (himself a former member of the Maryland General Assembly) chose to support their position by ignoring the question raised by appellant and, instead, arguing that merely minimizing contests among incumbents was not unconstitutional (State's Motion p. 7, Master's Opinion, J.S. App. 36). Incredibly, the Special Master even went so far as to say that, with respect to drawing districts to minimize contests, "an incumbent properly should be permitted to receive the benefits stemming from his performance in office" (J.S. App. 37).

It may be noted in passing that the legislative districting plan has had exactly the effect its drafters sought. In the Primary Election on September 14, 1982, every single one of the nineteen incumbent legislators who sought re-election in Montgomery County were victorious.

But all of that is not the issue. The issue is a simple one: Is gerrymandering a discrimination against those who are gerrymandered against and thus a denial of equal protection to those persons?

THE QUESTION RAISED IS VERY SUBSTANTIAL

The State and the Montgomery Legislative Delegation claim the question raised by appellant is not substantial. Appellant contends the question is very substantial. If the Court accepts review of this case, and grants a decision in favor of appellant

that legislative gerrymandering is unconstitutional, it will be the most substantial, significant and important decision by this Court since the basic reapportionment decision of Baker v. Carr, 369 U.S. 186 (1962).

The question is so substantial that it goes to the very heart of our representative democracy. Is there any way in our democracy to rid our country of the discrimination of gerrymandering which seriously and significantly undermines a principal institution of our nation's democracy, its legislative bodies?

As a practical matter, only this Court can put an end to gerrymandering and make fair legislative reapportionment a reality.

THE REQUIREMENT THAT A LOWER COURT "EXPRESSLY PASS ON" A FEDERAL CONSTITUTIONAL ISSUE DOES NOT APPLY

The Montgomery Legislative Delegation argues (Montgomery Motion, pp 11-13) that the federal question raised by appellant was not expressly passed upon by the Court of Appeals of Maryland below since that Court has issued only a Per Curiam Order (J.S. App. 1) which states, in pertinent part, that "for reasons to be set forth in an opinion later to be filed", appellant's petition "failed to establish any violation of the Federal Constitution". That Per Curiam Order was issued June 4, 1982 and that Court has still not published its promised subsequent Opinion.

Rule 16.1(b) of this Court states that a motion to dismiss may be made if "the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on;" (underlining added).

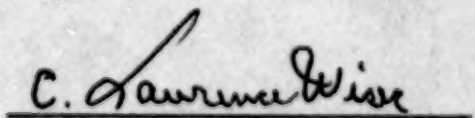
The requirement that the question "be expressly passed on is in conjunction with (not as an alternative to) the requirement

that the question has been timely or properly raised. The Montgomery Legislative Delegation concedes that the question was timely and properly raised by appellant in the court below (Montgomery Motion p.6). Therefore, it is not essential also, that the lower court have expressly passed upon the question. If this were not so, lower courts could prevent proper appeals to this Court by ignoring federal questions or, as in this case, by delaying the detailed Opinion discussing the federal question until after the ninety-day period for appeal has run (which ran in this case from the date of the Per Curiam Order issued on June 4, 1982 and which therefore expired on September 2, 1982).

CONCLUSION

Gerrymandering is an invidious discrimination which is a cancerous disease striking at the very foundations of our legislative bodies, the basic institutions of our democracy. The political realities are that the desire for perpetuation in office by legislators who draw new legislative district lines in reapportionment makes impossible, as a practical matter, the resolution of this basic problem through legislative action. Only action by this Court can put an end to gerrymandering with its discrimination against and denial of equal protection to those against whom the gerrymandering is directed.

Respectfully submitted,



C. Lawrence Wiser

Appellant